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SUPREME COURT, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 175

ELMER SAMUEL CHAPMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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Opinion Below

The opinion of the Court of Appeals for the Fifth Circuit (R. 79) is reported at 272 F2d 70.

Jurisdiction

The judgment of the Court of Appeals was entered on the 1st day of December, 1959 (R. 83). A petition for rehearing was denied on January 7, 1960 (R. 86). The petition for a writ of certiorari was filed on February 6, 1960 and was granted on June 27, 1960 (R. 87).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Constitutional Provisions, Statutes and Federal Rules Involved

The Fourth Amendment to the Constitution of the United States, Sections 5174, 5601 and 5606, Internal Revenue Code of 1954, Rule 41(e), Federal Rules of Criminal Procedure, which are set forth in the Appendix.

Question Presented

1. Was petitioner's immunity from unreasonable searches and seizures as guaranteed under the Fourth Amendment of the Constitution of the United States violated when a Georgia state law enforcement officer, without a warrant of any kind, on a Sunday afternoon, opened a closed bathroom window of a residential type house in a residential area, entered said house by climbing through said window and found evidence therein which was used in the federal prosecution of petitioner, the circumstances being as follows:

a. Petitioner was the exclusive lessee of the premises and had not given his consent for said entry, search or seizure.

b. The entry was not made for the purpose of making an arrest but for the purpose of securing evidence to support a future arrest.

c. The *one and only* circumstance known to said officer before his entry which might have suggested a violation of any law within or in the vicinity of said house was the apparent odor of fermenting mash detectable only when in close proximity to said house.

d. At the time of said entry there was no threat of removal or destruction of said house or any property

therein and no threat of flight of anyone therefrom. The three persons present at the time of the entry could have adequately secured the premises while obtaining a search warrant.

e. The owner of a one-half interest in said house had given his permission for the entry but only after advising the officers that the house was rented out for residence purposes and that he believed the house was at the time being occupied as a residence; the entering officer at the time of his entry having no knowledge or information to the contrary.

f. The participating state officers immediately after the entry contacted federal officers according to their official instructions and standing procedure and took no further action pending the federal officers' arrival. Thereafter petitioner was arrested when he entered the house and the arresting officer immediately telephoned the federal officers and when told they were on their way awaited their arrival with petitioner outside the house. Upon the arrival of the federal officers the search of the house and seizure of the evidence was completed under the direction of the federal officers to pursue federal prosecution.

Statement of the Case

Petitioner was indicted in the District Court of the United States for the Middle District of Georgia, in a four count indictment charging violations of the Internal Revenue Laws relating to liquor, in substance as follows (R. 1, 2):

Count One—Possessing and having under his control a distilling apparatus.

Count Two—Carrying on the business of a distiller without giving bond.

Count Three—Carrying on the business of a distiller with intent to defraud the United States of taxes.

Count Four—Working in a distillery.

Petitioner timely filed his Motion to Suppress Evidence (R. 3, 4) obtained in a search of and seizure from the house in question, alleging that said evidence was "obtained by an unlawful search and seizure without warrant. This defendant does show that said unlawful search and seizure was effectuated on February 16, 1958, upon premises known as the Bridgman house, Airport Cross Road, Macon, Georgia. Petitioner does show that at the time of said search he was the lessee of the premises."

Said Motion to Suppress Evidence was heard by the District Court, evidence was presented (R. 5-61) and said motion was denied (R. 61). Petitioner was then brought to trial in said District Court (R. 62-75), the evidence sought to be suppressed was admitted into the evidence during the trial and at the close of the evidence of the prosecution, the Court directed and the jury returned a verdict of not guilty as to Count Four, (working at a distillery) (R. 77). At the close of all the evidence, petitioner renewed his Motion to Suppress Evidence and further moved the Court to rule out of the evidence said evidence sought to be suppressed. Both said motions were overruled in their entirety and petitioner was thereafter convicted and sentenced on Count One, to serve one year and one day in the custody of the Attorney General and on each of Counts Two and Three the imposition of sentence was suspended and petitioner placed on probation for a period of five years (R. 76).

On an Appeal in Forma Pauperis to the United States Court of Appeals for the Fifth Circuit, petitioner's conviction was affirmed on December 1, 1959 (R. 83) and his

petition for rehearing was denied on January 7, 1960 (R. 86, 87).

Order granting leave to proceed in forma pauperis and writ of certiorari to the United States Court of Appeals for the Fifth Circuit was entered on June 27, 1960 (R. 87).

The facts material to the consideration of the questions presented are as follows:

On Sunday, February 16, 1958, one Mr. Bridgman, the owner of a one-half interest in subject house, a residential type house in a residential area (R. 24, 25, 26, 60, 63, 64), went to said house to invite the occupants and lessees of said house to come to church. The owners of said house had some months previously rented said house through a rental agent to a person or persons unknown to them and had been collecting the rent through the agent. Bridgman believed the house to be occupied as a residence at the time. Upon walking up to the house Bridgman smelled an odor of mash emanating from the house and noted that there were shades pulled down over all the windows so that he could not see into the house. Bridgman then returned to his home and called Georgia State revenue agent Chance and reported what he had smelled and observed at the house (R. 71-75).

Chance then in the company of Bibb County policeman Harbin picked up Bridgman at his home and the three drove to the house, smelled the odor of mash emanating from the house and walked around the house and tried to look into the windows but couldn't see in because of the shades (R. 8-10, 46, 64). After Bridgman sanctioned the officers' entry into the house (R. 13, 46), Harbin fully aware of the house being leased for residential purposes (R. 54), knowing that Bridgman believed it to be occupied as a residence and not having any reason to believe that the house was not being occupied as a residence (R. 13,

54, 64, 65), then tried several windows finding all of them locked until he tried a bathroom window which was unlocked (R. 46). Without a warrant of any kind (R. 53) Harbin then raised this bathroom window, pushed back the shade and entered the house through that window (R. 46). The entry was made for the purpose of obtaining evidence to support the arrest of some then unknown person and not incident to an arrest (R. 58).

Immediately upon getting inside and observing a still therein, Harbin called to Chance to go get help and sat down and waited (R. 46, 47, 65). Harbin did not open a door and Chance and Bridgman did not then enter or look into the house (R. 11, 12). Harbin meant for Chance to get the federal revenue officers, Chance understood him to mean to get the federal revenue officers and Chance went immediately and called the federal officers (R. 12, 47, 48).

While the federal officers were on the way to the house, petitioner drove up to and entered said house and was placed under arrest by Harbin (R. 12, 47-49, 72). Harbin and petitioner then got in the car parked in front of the house and went immediately and called the federal officers and when told that they were on the way returned to the house and waited outside in the car until the arrival of the federal officers (R. 49). When the federal officers arrived, petitioner was turned over to them. the federal officers then searched the house, sifted, appropriated and seized evidence from the house and destroyed the still (R. 22, 23, 24, 50, 55).

The state officers understood that it was common practice at the time for state revenue men to call in federal authorities on still cases and they frequently followed this practice. The "bossman" of the state officers had instructed them to call in the federal authorities on cases of this type and he called the federal men in compliance with these instructions (R. 13, 14, 47, 48).

Each of the state officers at the time of the initial entry by Harbin was armed with a pistol and could have placed a guard on the house until obtaining a warrant before entering (R. 15, 54). There was no compelling or immediate need, such as threatening destruction or probability of change in the situation when the house was entered (R. 14, 15, 64). The only suggestion of a violation of any law at the time of entry was the smell of mash when in close proximity to the house (R. 46, 67).

Petitioner was at the time the lessee of the house (R. 4, 73-75).

ARGUMENT

Since the decision of the Court of Appeals below, this Court has held that evidence obtained by State officers during a search which, if conducted by federal officers, would have violated a defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over a defendant's timely objection in a federal criminal trial. *Elkins* v. *United States*, —— U. S. ——, 4 L. ed. 2d 1669, 80 S.Ct. 1437. Consequently, whatever questions concerning the so called silver platter doctrine and admissibility of evidence illegally acquired by state officers that might have heretofore existed in this case have been decided in favor of petitioner.

Also since the decision of the Court of Appeals below, this Court has held that because an accused's presence in an apartment searched was legal he had standing to raise the question of the legality of a search of that apartment. *Jones* v. *United States*, 362 U. S. 257, 4 L. ed. 697, 80 S.Ct. 725. The distinctions and refinements that formerly existed between invitees or guests and lessees or licensees were abolished in that decision so as to give to invitees

or guests clearly a standing upon which to challenge a search and seizure. While neither the district judge nor the Court of Appeals unequivocally held that petitioner, as lessee, had no such standing, the trial court did hint that such was the case and the Court of Appeals failed to properly recognize the rights, privileges and immunities due petitioner through such standing. In this connection, see *Trupiano* v. *United States*, 334 U. S. 699, 68 S.Ct. 1229; *United States* v. *Jeffers*, 342 U. S. 48, 72 S.Ct. 93, in which decisions it was held that the interest of a lessee furnishes the requisite quantum of interest to challenge an illegal search. The conclusion is inescapable that petitioner, as lessee of the premises searched, has a standing to challenge the search and seizure herein complained of.

The only issue now left for consideration is whether or not the search and seizure was illegal.

Neither the decision below of the Court of Appeals nor of the District Court can be squared with the provisions of the Fourth Amendment and the applicable decisions of this Court interpreting and applying the provisions of said amendment.

The decision of the Court below erroneously held that the search and seizure in question was legal under the existing facts and circumstances. Those facts and circumstances show that the *one and only* circumstance known to the officers before the entry which suggested a violation of any law within or in the vicinity of said house was the apparent odor of fermenting mash detectable only when in close proximity to said house. The entry was not for the purpose of an arrest nor the search and seizure incident to an arrest. There were no compelling circumstances to require entry without a warrant. The owner of a one-half interest in said house had consented to the

entry at a time long after exclusive rights of possession had been given to Lessee.

At the time of the search without warrant there was no violence within the house; no movable vehicle involved; no arrest; no imminent destruction, removal or concealment of the property seized; and the officers could have easily prevented any such destruction or removal by guarding the house until a warrant was obtained. There was ample opportunity to procure a warrant. A house with a telephone was next door and two armed officers and a civilian were there at the time. *Jones* v. *United States*, 357 U. S. 493, 78 S.Ct. 1253; *United States* v. *Jeffers*, 342 U. S. 48, 72 S.Ct. 93; *United States* v. *Rabinowitz*, 339 U. S. 56, 70 S.Ct. 430.

Search warrants are required except incident to a valid arrest or in exceptional circumstances. The burden is on those seeking the exemption to show the need for a search without a warrant. *United States* v. *Jeffers*, *supra*.

At the time the house was rented out for residential purposes and the part owner consenting to the entry believed that it was being occupied as a residence, all of which the officers knew and the entering officer had no information, knowledge, or reason to believe that the house was not at the time being occupied as a residence. Vindicated anticipation of what an illegal search may reveal does not validate a search otherwise illegal. Officers cannot justify a search by what they find in searching. *Trupiano* v. *United States*, 334 U. S. 699, 68 S.Ct. 1229;

This Court has established on numerous occasions as settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling house cannot of itself justify a search without a warrant. The facts here show nothing more prior to the entry than the detection of an odor apparently that of fermenting mash. Such

searches are unlawful notwithstanding facts unquestionably showing probable cause. *Agnello* v. *United States*, 269 U. S. 20, 46 S.Ct. 4, 70 L.Ed. 145; *Taylor* v. *United States*, 286 U. S. 1, 52 S.Ct. 466, 76 L.Ed. 951; *Jones* v. *United States*, 357 U. S. 573, 78 S.Ct. 1380, 2 L.Ed. 547; *Jones* v. *United States*, 357 U. S. 493, *supra*.

It is inconceivable that the search and seizure herein can be justified in view of this Court's holding in *Jones* v. *United States*, 357 U. S. 493, *supra*. There the officers had received reports that a still was located in the defendant's house, they saw spent mash coming from a hose that led close to the house, they smelled the distinctive odor of hot mash from the direction of the house and heard coming from within the house the sounds of voices and a blower burner commonly used to heat distilleries.

Notwithstanding the decision in *Elkins* v. *United States*, petitioner emphasized that State officers may not offer into evidence in Federal Court any evidence illegally seized when there is a working agreement or understanding with Federal officers. *Byars* v. *United States*, 273 U. S. 28. It is immaterial whether Federal officers originated the idea or joined in it while the search was in progress so long as they joined before the object of the search was completely accomplished. To assist in the analysis and selection of evidence is participating although Federal agents knew what they were likely to find before joining the search. Such shows that the "silver platter" doctrine is not applicable. Search is a functional, not merely a physical, process and is not completed until effective appropriation, as part of an uninterrupted transaction, of illicitly obtained objects for subsequent proof of an offense. To differentiate between participation from the beginning and joining before the search runs its course would draw too fine a line. *Lustig* v. *United States*, 338 U. S. 74. Search

and seizure are not easily isolatable but are bound together by one sole purpose and are incapable of being untied. *United States* v. *Jeffers*, *supra*.

Any attempt to justify this search on the basis of the lessor's consent to the entry fails under even the most cursory analysis. The consent of the lessor affords the officers no legitimate basis for such entry as they made. To say that one who has some peculiar right, ownership or interest in a premises, e.g. lessor, one holding title for security purposes, innkeeper, etc., can legitimately authorize a search therein for contraband or evidence to be used against another who has an equally peculiar right or interest therein and possession thereof, e.g. a tenant, borrower, hotel guest, etc. is to say that the Constitutional immunities afforded the latter are subject to the actions of the former. Such guarantees under the Constitution cannot be so lightly disposed of by one who—at most—would have only some possible statutory or common law right to enter premises in order to prevent waste. The evidence below firmly established that the premises searched was under lease to and in the possession of petitioner.

Any statutory or common law right that is concerned solely with the civil remedies of a landlord as to the protection of his *property* in no manner whatsoever could be used by law enforcement authorities to circumvent the provisions of the Fourth Amendment to the Constitution of the United States.

The owner of contraband possesses no property rights therein; by the same token the lessee of premises used in violation of the law may forfeit what *property rights* he has therein. However, in neither case does he lose the privileges and immunities guaranteed to him by the Fourth Amendment as against unreasonable searches and seizure.

If the contrary were true lessees could seldom, if ever, be afforded the protection of the Fourth Amendment *as*

regards criminal prosecution against them if landlords granted carte blanche authority to law enforcement agents to search.

Assuming arguendo the landlord had a right to enter the premises and take the civil steps necessary to enjoin any waste being committed therein, such could be used in a criminal prosecution against the tenant if he timely asserts his rights under the Fourth Amendment.

Constitutional rights should have the force of cutting across contractual rights when the need arises as is found in the instant situation.

Here, there was an unwarranted invasion of the lessees rights under the Fourth Amendment. The precedent that will be set if the judgment of the lower court is affirmed will tear away the protective cloak of a defendant in a criminal case that was so many, many years in the weaving. The net pain to law enforcement in no way outweighs this right of a tenant. This could never be truer than now when there are thousands, even millions, who occupy their "houses" (Amendment IV) under some form of lease, a rental contract or security arrangement whereby title to the fee is rested in the lender.

Conclusion

It is respectfully submitted that the judgment of the United States Court of Appeals for the Fifth Circuit be vacated and set aside and that this case be remanded to the United States District Court for the Middle District of Georgia with instructions to vacate and set aside the judgment and commitment with instruction to enter an appropriate order suppressing the evidence illegally obtained from the house.

Certificate of Service

I, J. Sewell Elliott, certify that I have, on the date shown below, served a true copy of the within brief of petitioner by mail upon the Solicitor General, Department of Justice, Washington, 25, D. C. by depositing same in a United States Post Office with sufficient air mail postage, prepaid, addressed to him at his Post office address, in accordance with Rule 33(1), Supreme Court Rules.

This 19th day of November 1960.

J. Sewell Elliott

Brief respectfully submitted;

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Appendix

Constitutional Provisions

Constitution of the United States

Amendment IV—Searches and Seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes

Section 5174, Internal Revenue Code of 1954—

Registry of stills.

(a) Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used: Provided, That stills or distilling apparatus not used or intended to be used for the distillation, redistillation, or recovery of distilled spirits are not required to be registered under this section.

Section 5601, Internal Revenue Code of 1954—Penalty and forfeiture for possession of unregistered still or distilling apparatus.

Every still or distilling apparatus not registered as required by section 5174, together with all personal property in the possession or custody or under the control of the person required by section 5174 to register the still or distilling apparatus, and found in the building, or in any yard

or inclosure connected with the building in which the same may be set up, shall be forfeited. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5174 shall pay a penalty of $500, and shall be fined not more than $1,000, and imprisoned not more than 2 years. Aug. 16, 1954, 9:45 a. m., E.D.T., c. 736, 68A Stat. 683.

Section 5606, Internal Revenue Code of 1954—Penalty and forfeiture for distilling without giving bond

Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not more than $5,000 and imprisoned not more than 2 years. All distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

Rule 41(e). Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.